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IN THE

United States Supreme Court

RUGGERIO BOIARDO, :

Petitioner, :

- vs -

STATE OF NEW JERSEY, :

Respondent. :

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE STATE OF NEW JERSEY

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STATEMENT OF CASE

Petitioner, Ruggerio Boiardo and eighteen other persons were convicted under an indictment charging them with conspiracy to operate a lottery and violate the laws pertaining to the business of a lottery between August 5, 1966, and February 3, 1967, contrary to the provisions of *N.J.S.* 2A:98-1. In addition thereto, twelve of the nineteen persons were convicted on one or more indictments charging them with violations of *N.J.S.* 2A:112-3 and *N.J.S.* 2A:121-3 relating to the crimes of maintaining a gambling establishment and possession of lottery paraphernalia. All of the indictments were consolidated for the purpose of trial.

At trial, the State's proof disclosed that petitioner and his co-defendants were engaged in the operation of a massive lottery business. Federal agents testified that during their surveillance, many of the defendants were seen picking up brown paper bags containing lottery slips and cash received from bettors at various locations throughout the state and depositing them at several "lottery banks." The bags were often transferred from one automobile to another and then driven over circuitous routes presumably to avoid detection. Many of the defendants were observed in the vicinity of the Ben Thomas Luncheonette and the Altruist Club, both in the City of Newark, which served as bases of operations and meeting places for the conspirators.

The State offered further testimony concerning the details of the raid conducted by federal law enforcement officers and the lottery paraphernalia seized, including lottery slips, numerous adding machines, cut cards, cash, coin wrappers, pads and envelopes, all of which was introduced into evidence.

Federal agent Domimic Germano, who served as an undercover agent pretending to be a waiter employed at a Catskill Mountain resort, testified that he developed a close relationship with several defendants. According to his testimony, Agent Germano visited the luncheonette on sixty-eight days, often placing bets with defendants Cipriano and Thomas. On numerous occasions, he overheard conversations between several of the defendants relating to the operation of the lottery. Agent Germano stated that on forty-two days, he observed Ruggerio

Boiardo meet with Andrew Gerardo, Toby Boyd, Angelo Sica, and Louis DiBenedetto inside the luncheonette. On occasion, Germano witnessed wrapped packages, inferentially containing money, being passed to Boiardo or being placed in his automobile.

During the course of his surveillance, Agent Germano engaged in conversations with Thomas and Cipriano concerning the methods employed in operating the lottery. The name of petitioner Boiardo was mentioned and his roles in the criminal scheme explained in detail. *In toto*, the record below reveals a well organized disciplined criminal gambling operation executed by the defendants throughout the State of New Jersey. There is no doubt but that Boiardo was the prime mover of the conspiracy and bets given to the participants were secured by his reputation as the boss who could reliably get things done.

Upon conviction, petitioner filed a notice of appeal in the New Jersey Superior Court, Appellate Division, urging numerous alleged errors as grounds for reversal. The Appellate Division, in a twenty three page opinion, affirmed defendants' conviction. The New Jersey Supreme Court thereafter denied petitioner's application for certification.

This brief is submitted in opposition to petitioner's application for a writ of certiorari.

PRELIMINARY STATEMENT

The respondent, State of New Jersey, accepts the Statements of Opinion Below, Jurisdiction, Questions Presented and Constitutional and Statutory Provisions Involved contained in the brief of the petitioner, except as supplemented or contradicted *infra*.

REASONS WHY WRIT SHOULD NOT BE GRANTED

POINT I

THE TRADITIONAL CONSPIRATOR EXCEPTION TO THE HEARSAY RULE IS NOT VIOLATIVE OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioner contends that constitutional error was committed by the admission of Agent Germano's testimony relating conversations between himself and two co-conspirators. These conversations corroborated the State's circumstantial proof that Bouardo was "the prime mover in the conspiracy." Since none of the conspirators took the stand, petitioner did not have an opportunity to cross-examine them. He therefore claims that he was denied his right of confrontation afforded by the Sixth Amendment to the United States Constitution.

This argument is predicated upon the erroneous assumption that recent decisions by the Fifth Circuit Court of Appeals compel the conclusion that the traditional co-conspirator exception to the hearsay rule is repugnant to the Sixth Amendment. Such is not the case, however.

This court recently rejected a similar claim in *Dutton v. Evans*, 000 *U.S.* 000 (1970). There, the appellee was convicted of murder in the first degree following a jury trial in which a witness named Shaw was permitted to testify, over defense counsel's objection, concerning a statement he claimed was made to him by an alleged accomplice. At trial, Shaw testified that the statement was made in a prison conversation immediately after the arraignment of appellee's co-defendant. The statement clearly implicated appellee in the commission of the crime and was admitted upon the basis of a Georgia statute which provided "after the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all." *Ga. Code Ann.* §§38-306 (1954 rev.). The Supreme Court of Georgia affirmed the conviction and this Court denied appellee's petition for a writ of certiorari. Evans then filed a petition for a writ of habeas corpus which was denied by the Federal District Court. The Court of Appeals for the Fifth Circuit reversed, holding that the prosecution had denied Evans the

right to be confronted by all witnesses against him. The Court noted that the Georgia statute went well beyond the traditional conspirator exception to the hearsay rule, since it permitted evidence as to statements made subsequent to the attainment of the objectives of the criminal project. In reversing the decision of the Court of Appeals, Mr. Justice Stewart opined as follows:

> "It is not argued, nor could it be, that the constitutional right to confrontation requires that no hearsay evidence can ever be introduced. In the *Pointer* case itself, we referred to the decisions of this Court that have approved the admission of hearsay:
>
> > 'This Court has recognized the admissibility against an accused of dying declarations, *Mattox v. United States*, 146 *U.S.* 140, 151, and of testimony of a deceased witness who has testified at a former trial, *Mattox v. United States*, 156 *U.S.* 237, 240-244. See also *Dowdell v. United States*, *supra*, 221 *U.S.*, at 330; *Kirby v. United States*, *supra*, 147 *U.S.*, at 61 . . . There are other analogous situations which might fall within the scope of the constitutional rule requiring confrontation of witnesses.'
>
> * * *
>
> [T]his Court has never indicated that the limited contours of the hearsay exception in federal conspiracy trials are required by the Sixth Amendment's Confrontation Clause. To the contrary, the limits of this hearsay exception have simply been defined by the Court in the exercise of its rule-making power in the area of the federal law of evidence.
>
> * * *
>
> From the viewpoint of the Confrontation clause, a witness under oath, subject to cross-examination, and whose demeanor can be observed by the trier of fact, is a reliable informant not only as to what he has seen but also as to what he has heard."

Implicit in this Court's decision in *Dutton v. Evans*, *supra*, is the proposition that the confrontation clause is not violated merely because a defendant is not permitted to confront and cross-



examine a witness against him. Exceptions to the hearsay rule have been recognized and approved notwithstanding the fact that the right to confrontation is denied. See *Mattox v. United States*, 146 *U.S.* 140, 151 (1892). These exceptions have been created out of necessity and justified upon the ground that the circumstances provide a rational substitute for the benefit of confrontation.[1] In New Jersey, and throughout this country, a co-conspirator's declarations constitute an exception to the hearsay rule. See *New Jersey Rules of Evidence, Rule* 63(b). The purpose underlying the confrontation requirement is satisfied because the circumstances afford a sufficient guarantee of testimonial trustworthiness to justify admissibility. *Lutwak v. United States*, 344 *U.S.* 604, 617 (1953); *Fiswick v. United States*, 322 *U.S.* 211, 216-17 (1946); *Glazer v. United States*, 315 *U.S.* 60, 66 (1942); *United States v. Plata*, 361 *F. 2d* 958 (7th Cir. 1966); *State v. Carbone*, 10 *N.J.* 329, 343 (1952); *State v. Cavanna*, 70 *N.J. Super.* 176, 182 (App. Div. 1961); 2 *Jones, Evidence* § 54, pp. 221-23 (1958); 2 *Wharton, Criminal Evidence* § 430, pp. 132-35 (12th ed. 1955); *Wharton's Criminal Law and Procedure*, § 90, pp. 194-98 (1957); *Wigmore, Evidence*, § 1079 (3rd Ed. 1940); *Underhill's Criminal Evidence*, § 776, pp. 1410-14 (1935); *Annot.* 4 *ALR* 3rd 684 (1965); 16 *AmJur* 2d *Conspiracy* § 40 (1964).

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[1] As noted in *Dutton v. Evans, supra*, the hearsay rule and the confrontation clause contained in the Sixth Amendment overlap, but should not be equated in strict terms. See 5 *Wigmore*, Evidence § 1397, p. 131 (3d ed. 1940). The Sixth Amendment was not intended to act as a prohibition on the use of all hearsay. The states should be afforded certain latitude in developing their own rules of evidence. See Chadbourn "Bentham and the Hearsay Rule", Harv. L. Rev. 620, 625 (1956); Comment "Confrontation and the Hearsay Rule", 75 Yale L.J. 1434, 1436 (1966); *Uniform Rules of Evidence, Rule* 63 (9) (b). To adopt the position now urged by petitioner would altogether eliminate the use of much hearsay evidence permitted in criminal trials at a time when the judicial trend has been toward a salutory liberalization of hearsay exceptions.

Petitioner's reliance upon *Bruton v. United States*, 391 U.S. 123, (1968) is totally misplaced. There, this Court condemned the admission against defendant of a co-defendant's out-of-court confession upon the ground that the defendant's right of confrontation was violated. But it was expressly noted that no "recognized exception" to the hearsay rule was involved.

In the instant case, the statements made by co-conspirators Thomas and Cipriano were in furtherance of the objects of the criminal scheme during the pendency of the conspiracy. The record discloses that Agent Germano was so successful in gaining Thomas' and Cipriano's trust and confidence that on a number of occasions they sought his assistance in matters relating to the "organization". Germano often drove Cipriano from Thomas' luncheonette to a Sinclair Station on Stone Street. During these rides Cipriano revealed that they were on "organization" business.

Neither Thomas nor Cipriano considered Germano a mere stranger to the conspiracy as illustrated by the events on December 16, 1966. At approximately 10:25 A.M. Germano and Thomas were in the luncheonette, when Thomas told the agent "he had bets for Joe (Cipriano) from someone who had come into the luncheonette earlier but then forgot to give them to him." Germano took the money and the bet slips from Thomas and delivered them to Cipriano at the Sinclair Station. (Tr. 303). This incident warrants the conclusion that when Thomas and Cipriano communicated with Germano, they believed they were acting in the interest of the "organization."

The record in the instant case warrants a finding that the co-conspirators intended to further the conspiracy by their communications in two ways. First, the statements inspired confidence in the reliability of "the organization" by assuring Germano that if he "hit", he would be paid fully and promptly. Second, the friendly relationship between Cipriano and Germano made it natural for Cipriano to turn to the agent for reassurance in times of crisis. There is ample legal authority to justify the admissibility of the evidence under either theory.

In *United States v. Campisi*, 248 *F. 2d* 102 (2d Cir. 1957), defendants were convicted for a conspiracy to traffic in narcotics. On appeal they challenged the admissibility of a conversation between an FBI undercover agent and a co-conspirator,

Santagata, wherein he told the agent that he was getting the heroin from the Campisi brothers in Newark. The agent said:

> "During this conversation with Santagata I told him that I had read in the newspaper about a man named Compy who had been murdered in Newark. He said that he knew the man and knew the whole family, that in fact the name of the man was Campisi and that they were the people we were doing business with in Newark . . . Santagata continued to say that he could not get pure heroin from these people because they were four brothers and they had many mouths to feed and he said we can't blame them for adulterating the heroin because there are so many mouths to feed and so much money to be paid out." *Id.* at 105-06.

The Court found that these statements furthered the conspiracy in the following way:

> "The identification of the Campisi brothers as the suppliers of the heroin . . . was of course damaging to appellant, but it was nonetheless admissible as the declaration of a co-conspirator in furtherance of the conspiracy . . . for all the sales were made pursuant to the single comprehensive arrangement. [The agent] had made complaints about the quality of the heroin and Santagata was anxious to retain such a good customer as [the agent] for the benefit of himself and his co-conspirators; and this explanation might well lead [the agent] to believe that they were all doing the best they could under trying circumstances." *Id.* at 106.

A similar situation was presented in *Salazar v. United States* 405 *F. 2d* 74 (9th Cir. 1968), where defendant was convicted for narcotic violations. On appeal, he argued that the court committed prejudicial error in admitting over objection, testimony concerning statements made by his co-conspirator, Sesman, to a government undercover agent, because the declarations were not in furtherance of the conspiracy. The statements were made in a conversation between Sesma and the agent outside of Sesma's house when the agent came there to receive delivery of a large quantity of heroin. Specifically,

Sesma told the agent that his source of supply was at that moment in the house preparing the heroin. The agent waited briefly and then knocked at the door. When Sesma answered, the agent told him he was tired of waiting. He was admitted to the house and saw defendant in the dining room with the heroin.

Defendant argued that the statements were merely narrative remarks of Sesma indirectly identifying him. The Court held that the statements furthered the conspiracy because Sesma made them to prevent the agent from leaving before the sale was concluded. Sesma had repeatedly failed to meet a delivery date and since the agent exhibited restlessness, it could reasonably be inferred that he feared the customer [agent] would be suspicious about further delay.

In *United States v. Pardo-Bolland*, 348 *F. 2d* 316 (2d Cir. 1965), three defendants were convicted of conspiracy to violate the federal narcotic laws. On appeal, they attacked the admissibility of the agent's testimony that one conspirator said to another "in the past the man has always been here when I arrived," as merely narrative of past occurrences. The Court disagreed holding that:

> "the narration was not merely historical but was relevant to the criminal conspiracy in which [the three defendants] were engaging. A statement of one conspirator to another during the act or course of a conspiracy, giving the full setting of an upset with the purpose of getting reassurance or other help, does not cease to be in furtherance of the conspiracy because it contains a natural and pertinent reference to a past fact."

The justification advanced in *Campisi*, *Salazar*, and *Pardo-Bolland* for admitting the challenged statements applies with equal force to the case at bar. Germano was a regular bettor. There was evidence that there was competition between organizations for business. Accordingly, Cipriano repeatedly attempted to assure Germano of the reliability of petitioner's "organization." He told Germano that the chief in the organization always paid off right away and that in Jersey City "you never know when you'll get paid." Cipriano had formerly been an independent but it was too much of a worry and now he

belonged to the organization. An independent could not operate without the cheif's approval and then only under strict instructions. Among these instructions were to pay off "hits" promptly and in full so there would be no trouble with people that "hit" and didn't get paid. (Tr. 300). Additionally, the chain of command was related and the manner in which the organization functioned was also described. If there were problems with his own bookmaking he could always see anyone [Boiardo, Farina, Gerardo, and Boyd] in the hierarchy. On numerous occasions, Cipriano repeated the fact that the organization always paid off "hits" right away because this was what the chief wanted and demanded. (Tr. 317-318).

Another example of the conspirators' making statements intended to promote business and obtain reassurance were those made to Germano regarding the change in the odds. On December 16, 1966, while Cipriano and Germano were in the luncheonette, petitioner entered and talked to Cipriano. Cipriano then took a pack of cigars and cigarettes to petitioner's car. Ten minutes later Cipriano and Germano left the luncheonette and went to the Sinclair station on Stone Street. During the ride Cipriano said to Germano, "he wished they would do something regarding the change in odds or hits on double numbers . . . there would be a meeting this week-end with the chief to try to straighten out the situation". (Tr. 303). On December 20, 1966, Germano and Cipriano were in the luncheonette, when co-conspirators Boyd and Gerardo entered. They called Cipriano over and talked. Cipriano returned and said "that the odds were back to normal again", a condition favorable to Cipriano's customers. Again, Germano was taken into the confidence of the co-conspirators in furtherance of the conspiracy.

It is submitted that Germano's relationship with the co-conspirators insured the reliability of the statements made to him. Agent Germano testified fully and accurately as to what he had observed. He was subjected to a protracted and thorough cross-examination by defense counsel. Moreover, contrary to petitioner's allegation, there was ample evidence of his complicity in the conspiracy wholly apart from the hearsay evidence. This is not a case in which a defendant is convicted on the basis of unimpeachable hearsay by non-appearing witnesses.

Indeed, as noted by the court below, the record literally shrieks of petitioner's guilt.

The State submits that the Superior Court, Appellate Division adequately dealt with the issue raised in petitioner's present application.

POINT II

PETITIONER BOIARDO'S RIGHT TO A FAIR AND IMPARTIAL JURY WAS NOT VIOLATED BY PERMITTING JURORS PITTS AND MAJETT TO REMAIN ON THE JURY PANEL DURING ITS DELIBERATION.

During the course of the six-week trial, three of the sixteen jurors empaneled to hear the case were approached by persons in an attempt to influence their verdict. In each case, the juror reported the incident to the trial judge who then questioned him out of the presence of counsel. The trial court then advised counsel of what had transpired and conducted a hearing in open court out of the presence of the other members of the jury. During this hearing, each of the three jurors related what had occurred. In response to questions propounded by the judge, all jurors stated that the incidents had not been reported to other jurors on the panel and in no way affected their ability to render a fair and impartial decision based upon the law and evidence in the case.

James Pitts testified that he had been approached by an unknown person on April 6, 1969. According to Mr. Pitts, an unnamed unidentified individual came to his door on that Sunday afternoon and offered him one thousand dollars if he "would just consider the facts." Mr. Pitts told the stranger that he would not have to be paid for considering the issues raised in the matter. He then ushered the stranger out of the house. Approximately fifteen minutes later, the man returned and apologized, stating that he was merely doing his job. Mr. Pitts stated that the incident would not cause him to do anything other than consider the facts in evidence. (Tr. 9-1 to 10-6).

Another juror, Angie Majett, testified that on April 5, 1969, a man came to her house allegedly looking for her husband. After Mrs. Majett had opened the door to the house, the unidentified stranger indicated that he wished to talk to her concerning her role as a juror. Mrs. Majett responded that she was not interested in talking to anyone about the case. The man then stated that someone had sent him and offered Mrs. Majett a mink coat and money. Mrs. Majett immediately slammed the door in his face. (Tr. 364-17 to 21).

Defense counsel requested that the jurors who had been

approached be excused, but the trial court denied the application. Thereafter defense counsel's motion for a mistrial was also denied. After the charge to the jury and before twelve jurors were chosen to decide the case, defense counsel moved to exclude the three jurors involved. This motion was also denied and two of the three jurors were selected to serve on the twelve member jury which thereafter deliberated and rendered the verdict.

Petitioner contends that his right to be tried by an impartial jury was violated and that the trial judge failed to make sufficient inquiry as to the impartiality of the three jurors.

The State submits that the method employed by the trial judge in dealing with each approach to the juror was appropriate and sufficiently protected petitioner's rights. A trial judge necessarily must control the conduct of the trial and the necessary discretion for that purpose is conferred on him. This discretion extends to the means employed to insure a fair and impartial jury. The granting of a mistrial for unauthorized communications with jurors is largely within the discretion of the trial judge and his decision should not be disturbed unless clearly erroneous. *Tillman v. United States*, 406 *F. 2d* 930, 938 (5th Cir. 1969), judgment vacated on other grounds, 395 *U.S.* 830 (1970). The discretion of a trial court to grant a mistrial in cases of juror misconduct includes the discretion to determine the extent and type of investigation requisite to a ruling on a motion. Id. at 938.

The decision of the trial court in the instant case concerning the scope and extent of the hearing in no way amounted to constitutional or prejudicial error. While the incident was unfortunate, there was nothing comparable to the probability of prejudice present in *Remmer v. United States*, 347 *U.S.* 227 (1954), cited by petitioner in support of his position. There, after a guilty verdict, defendant discovered that a juror had been approached during the course of the trial. When this occurred, the trial judge advised only the prosecutor, who, with the permission of the judge ordered an investigation by the Federal Bureau of Investigation. Defendant used this information as the basis for a motion for a new trial. On appeal, following the denial of that motion, this Court held that the trial record did not reveal whether the approach to the juror was harmless to defendant and ordered a hearing with respect to this question. The case again reached this Court after the

hearing, *Remmer v. United States*, 350 *U.S.* 377 (1956), and it was held that the hearing conducted was inadequate since undue emphasis had been placed on whether the offense had been committed rather than determining whether the juror's ability to impartially decide the case had been prejudiced. This court *sua sponte* considered the latter question on the record and concluded that there was prejudice requiring a new trial. The juror in *Remmer, supra,* conceded that he had "been under terrific prejudice" from the combination of an offer of a bribe and an interview with the Federal Bureau of Investigation. The Supreme Court described the juror "as a disturbed and troubled man," whose freedom of action as a juror had been adversely affected.

The facts in the instant case required no such conclusion as to jurors Pitts and Majett. Here, there is no basis for doubting the ability of the two jurors to exercise the fair judgment they promised. The fact that defense counsel was not afforded full opportunity to cross-examine them is of no weight, since such a procedure would have left an indelible impression upon the minds of the jurors completely imparing their ability to impartially render a fair verdict. *United States v. Miller*, 381 *F. 2d* 529, 538-40 (2nd Cir. 1967), *cert.* denied 392 U.S. 929 (1968), rehearing denied 393 U.S. 902 (1968). The factual pattern presented in the instant case is entirely different from that in *Remmer* where the trial court did not even interview the juror and the record did not show what had actually transpired as the later opinion of this Court made clear. It was the paucity of information relating to the entire situtation coupled with the presumption which attaches to attempts to bribe jurors that made manifest the need for a full hearing.

The instant case presents a completely different picture. Both jurors stated that they had not conveyed the facts of what had transpired to other jurors impaneled in the case. Both jurors were instructed not to inform the other jurors what had occurred. Both jurors stated in unequivocal terms that they would and could remain fair and impartial. In no sense was their freedom of action as jurors adversely affected. The record below reveals that the presumption of prejudice was sufficiently rebutted by the testimony of the two jurors and that petitioner was in no way prejudiced. See *Johnson v. United States*, 207 F.

2d 314, 322 (5th Cir. 1953), *cert.* denied 347 U.S. 938 (1954); *United States v. Compagna*, 146 F. 2d 524, 528 (2nd Cir. 1944).

POINT III

THE INSTRUCTIONS OF THE TRIAL COURT ON THE ISSUE OF CONSPIRACY WERE CORRECT AND DO NOT MERIT REVIEW BY THIS COURT.

Petitioner next argues that the court below erred in refusing to give a requested charge submitted by him regarding evidence essential to proof of the conspiracy. The requested charge provided:

> "In determining whether or not a defendant, was a member of a conspiracy, the jury are not to consider what others may have said or done. That is to say, the membership of a defendant, in a conspiracy must be established by evidence of his own acts and conduct, what he himself said or did." (DB69a-32 to 39).

While the trial court did not employ the exact language contained in petitioner's request and presently urged in the instant petition, the import of the requested charge was expressed by the judge in the following terms:

> "Under our law this declaration may be considered against not only the speaker and the subject of the declaration but as against all of the defendants if you find the conspiracy existed and they were a party of it.
>
> Still in another way, once an agreement among the conspirators is proven then any acts or declarations specified in the indictment as an overt act and done in the execution of the conspiracy by one or more of the alleged conspirators is considered under the law to be the act or declaration of all the conspirators." (Tr. 24-20 to 25-26).

Implicit in the trial court's statement was the proviso that before considering the hearsay statements, the jury must first determine that a conspiracy in fact existed and that petitioner was a participant. It could therefore be fairly deemed that the import of the requested charge was included in the trial court's instruction to the jury.

Even assuming that the court's instruction did not fairly encompass the request to charge, constitutional error was not committed. The court's instructions were supported by ample

authority. See *United States v. Corallo*, 413 *F. 2d* 1306, 1324-27 (2d Cir. 1969); *United States v. Ragland*, 375 *F. 2d* 471, 478-79 (2d Cir. 1967), *cert. denied* 390 *U.S.* 925 (1968); *United States v. Nuccio*, 373 *F. 2d* 168, 173-74 (2d Cir.) *cert. denied* 387 *U.S.* 906 (1967); *United States v. Stadter*, 336 *F. 2d* 326, 329-30 (2d Cir. 1964), *cert. denied* 380 *U.S.* 945 (1965); *United States v. Stromberg*, 268 *F. 2d* 256, 264-66 (2d Cir.), *cert. denied sub nom, Lessa v. United States*, 361 *U.S.* 863 (1959); *United States v. Dennis*, 183 *F. 2d* 201, 230-31 (2d Cir. 1950), aff'd on other grounds, 341 *U.S.* 494 (1951).

There must be independent evidence establishing that a defendant is a member of the conspiracy. However, this independent proof of membership is "a preliminary question for the judge to decide as to each defendant whether, if the Government's witnesses are believed, he and the various declarants were engaged in a common conspiracy . . ." *United States v. Stromberg*, *supra*, at 266. The jury is then given all of the evidence, including the hearsay declarations, to consider on the guilt or innocence of a defendant on a conspiracy charge. As stated in *United States v. Stadter*, *supra*, 366 *F. 2d* at 329:

> "[T]here is no requirement, as appellants have contended, that the jury must first find from the independent evidence that a conspiracy existed and that the defendants were members of it before considering the hearsay. Indeed, to so hold would have the practical result of destroying this well established exception to the hearsay rule."

In the case at bar, the trial judge correctly charged the necessary elements of conspiracy. This was all that was required. Once the trial judge made his determination that there was sufficient independent evidence to show that petitioner Boiardo was a "member" of the conspiracy, it was not necessary for him to limit the jury's consideration on membership to the independent acts and statements of Boiardo. The trial judge made such a finding in his denial of Boiardo's motion for a judgment of acquittal at the end of the State's case. See *United States v. Stromberg*, *supra*. After that, it was unnecessary to require the jury to restrict its inquiry on membership and overt acts to the limitations requested by petitioner. While such an instruction would have been favorable to petitioner, it was not

correct or required. See *State v. Laws*, 50 *N.J.* 159, 176-77 (1968) *cert. denied* 393 *U.S.* 971 (1968); *State v. Brown*, 46 *N.J.* 96, 103 (1965).

Finally, it is to be noted that the requested instruction was unduly confusing and completely neutralized the effect of statements admitted under the traditional conspiracy exception to the hearsay rule. Under petitioner's position, once a jury determines beyond a reasonable doubt that a defendant is a member of a conspiracy, there is no need to consider the hearsay statement. To hold that a jury must first make a finding beyond a reasonable doubt that a conspiracy exists and that defendant is a member before considering relevant declarations of co-conspirators in furtherance of the criminal objects, would reduce the traditional hearsay exception to a meaningless absurdity. The constitution in no way supports or compels such a result.

CONCLUSION

For the reasons discussed above, it is respectfully urged that *certiorari* should not issue to review the decision of the court below.

Respectfully submitted,

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